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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  NORTHWESTERN UNIVERSITY,

12                  Plaintiff,

13                  v.

14                  KING COUNTY,

15                  Defendant.

16                  CASE NO. 2:20-cv-01043-JLR-JRC

17                  ORDER ADOPTING AGREEMENT  
18                  REGARDING DISCOVERY OF  
19                  ELECTRONICALLY STORED  
20                  INFORMATION

21                  The parties hereby stipulate to the following provisions regarding the discovery of  
22                  electronically stored information (“ESI”) in this matter:

23                  **A. General Principles**

24                  1. An attorney’s zealous representation of a client is not compromised by conducting  
discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate  
in facilitating and reasonably limiting discovery requests and responses raises litigation costs and  
contributes to the risk of sanctions.

1       2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.  
 2 26(b)(1) must be applied in each case when formulating a discovery plan. To further the  
 3 application of the proportionality standard in discovery, requests for production of ESI and related  
 4 responses should be reasonably targeted, clear, and as specific as possible.

5       **B. ESI Disclosures**

6       Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each  
 7 party shall disclose:

8       1. Custodians. The five custodians most likely to have discoverable ESI in their  
 9 possession, custody, or control. The custodians shall be identified by name, title, connection to  
 10 the instant litigation, and the type of the information under the custodian's control.

11       2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared  
 12 drives, servers), if any, likely to contain discoverable ESI.

13       3. Third-Party Data Sources. A list of third-party data sources, if any, likely to  
 14 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud  
 15 storage) and, for each such source, the extent to which a party is (or is not) able to preserve  
 16 information stored in the third-party data source.

17       4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
 18 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the  
 19 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

20       **C. ESI Discovery Procedures**

21       1. On-site inspection of electronic media. Such an inspection shall not be required  
 22 absent a demonstration by the requesting party of specific need and good cause or by agreement  
 23 of the parties.

1       2.     Search methodology. To the extent applicable, the parties shall timely confer to  
2 attempt to reach agreement on appropriate search terms and queries, file type and date restrictions,  
3 data sources (including custodians), and other appropriate computer- or technology-aided  
4 methodologies (“Search Criteria”). The parties shall continue to cooperate in revising the  
5 appropriateness of the search methodology. If either party produces documents based on a search  
6 without first conferring with the other party regarding Search Criteria prior to that search, the  
7 other party shall have the right to challenge the sufficiency of the producing party’s Search  
8 Criteria. If a receiving party challenges a producing party’s Search Criteria, the burden shall be  
9 upon the receiving party to establish that the producing party’s Search Criteria were unreasonable  
10 under the circumstances.

11       3.     Format.  
12           a.     ESI will be produced to the requesting party with searchable text, in a  
13 format to be decided between the parties. Acceptable formats include, but are not limited to, native  
14 files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only  
15 with load files for e-discovery software that includes metadata fields identifying natural document  
16 breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

17           b.     Unless otherwise agreed to by the parties, files that are not easily converted  
18 to image format, such as spreadsheet, database, and drawing files, will be produced in native  
19 format.

20           c.     Each document image file shall be named with a unique number (Bates  
21 Number). File names should not be more than twenty characters long or contain spaces. When a  
22 text-searchable image file is produced, the producing party must preserve the integrity of the  
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1 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,  
2 the revision history.

3           d. If a document is more than one page, the unitization of the document and  
4 any attachments and/or affixed notes shall be maintained as they existed in the original document.

5           e. The parties shall produce their information in the following format: single-  
6 page images and associated multi-page text files containing extracted text or with appropriate  
7 software load files containing all information required by the litigation support system used by  
8 the receiving party.

9           f. The full text of each electronic document shall be extracted (“Extracted  
10 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text  
11 format (or Unicode text format if the text is in a foreign language) and shall be named with a  
12 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding  
13 production version of the document followed by its file extension).

14           4. De-duplication. The parties may de-duplicate their ESI production across custodial  
15 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian  
16 information removed during the de-duplication process tracked in a duplicate/other custodian  
17 field in the database load file.

18           5. Email Threading. The parties may use analytics technology to identify email  
19 threads and need only produce the unique most inclusive copy and related family members and  
20 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce  
21 a less inclusive copy.

22           6. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
23 the following metadata fields need be produced, and only to the extent it is reasonably accessible  
24

1 and non-privileged: document type; custodian and duplicate custodians (or storage location if no  
2 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;  
3 file extension; original file path; date and time created, sent, modified and/or received; and hash  
4 value. The list of metadata type is intended to be flexible and may be changed by agreement of  
5 the parties, particularly in light of advances and changes in technology, vendor, and business  
6 practices.

7       7. Time zone. The parties agree that the entirety of each party's ESI should be  
8 processed using a single time zone, identified as a fielded value in the production database load  
9 file.

10       **D. Preservation of ESI**

11       The parties acknowledge that they have a common law obligation, as expressed in Fed. R.  
12 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in  
13 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree  
14 as follows:

15       1. Absent a showing of good cause by the requesting party, the parties shall not be  
16 required to modify the procedures used by them in the ordinary course of business to back-up and  
17 archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
18 possession, custody, or control.

19       2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.  
20 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
21 where that data is created after a disclosure or response is made (unless excluded under Sections  
22 (D)(3) or (E)(1)-(2)).

- 1       3. Absent a showing of good cause by the requesting party, the following categories  
 2 of ESI need not be preserved:
- 3       a. Deleted, slack, fragmented, or other data only accessible by forensics.
  - 4       b. Random access memory (RAM), temporary files, or other ephemeral data  
       that are difficult to preserve without disabling the operating system.
  - 5       c. On-line access data such as temporary internet files, history, cache,  
       cookies, and the like.
  - 6       d. Data in metadata fields that are frequently updated automatically, such as  
       last-opened dates (see also Section (E)(5)).
  - 7       e. Back-up data that are duplicative of data that are more accessible  
       elsewhere.
  - 8       f. Server, system or network logs.
  - 9       g. Data remaining from systems no longer in use that is unintelligible on the  
       systems in use.
  - 10      h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or  
       from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that  
       a copy of all such electronic data is automatically saved in real time  
       elsewhere (such as on a server, laptop, desktop computer, or “cloud”  
       storage).

15      **E. Privilege**

- 16      1. A producing party shall create a privilege log of all documents fully withheld from  
 17 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this  
 18 Agreement and Order. Privilege logs shall include a unique identification number for each  
 19 document and the basis for the claim (attorney-client privileged and/or work-product protection).  
 20 For ESI, the privilege log may be generated using available metadata, including author/recipient  
 21 or to/from/cc/bcc names; the subject matter or title; and date created. Should the available  
 22 metadata provide insufficient information for the purpose of evaluating the privilege claim  
 23 asserted, the producing party shall include such additional information as required by the Federal  
 24

1 Rules of Civil Procedure. Privilege logs will be produced to all other parties no later than 30 days  
2 after delivering a production unless an alternative deadline is agreed to by the parties.

3       2. Redactions need not be logged so long as the basis for the redaction is clear on the  
4 redacted document.

5       3. With respect to privileged or work-product information generated after February  
6 14, 2020, parties are not required to include any such information in privilege logs.

7       4. Activities undertaken in compliance with the duty to preserve information are  
8 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

9       5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this  
10 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,  
11 constitute a waiver by the producing party of any privilege applicable to those documents,  
12 including the attorney-client privilege, attorney work-product protection, or any other privilege  
13 or protection recognized by law. Information produced in discovery that is protected as privileged  
14 or work product shall be immediately returned to the producing party, and its production shall not  
15 constitute a waiver of such protection.

16 DATED: April 8, 2022

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12     *Special Deputy Prosecuting Attorneys for  
13    Defendant King County*

14      **ORDER**

15     Based on the foregoing, IT IS SO ORDERED.

16     **DATED: April 12, 2022**

17       
18     J. Richard Creatura  
19     Chief United States Magistrate Judge